IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term, 1981

No. _____

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,
Defendant,
DEBRA JEAN MORRIS,
Real Party in Interest
and Appellant.

MOTION FOR LEAVE TO PROCEED

IN FORMAL PAUPERIS

The appellant, Debra Jean Morris, asks leave to file the attached Jurisdictional Statement without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The appellant's affidavit in support of this motion is attached hereto.

Dated: March 15, 1981.

STUART RICH
LISA E. WOCHOS
Counsel for Appellant
12346 Indian Trail Road
Los Gatos, CA 95030

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Real Party in Interest
and Appellant.

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I, DEBRA JEAN MORRIS, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was charged with violation of a Santa Clara County Ordinance proscribing nude entertainment. The present proceeding was initiated pursuant to my demurrer to the complaint based on various unconstitutional infirmities, primarily overbreadth and vagueness.

DEBRA JEAN MORRIS

Duly witnessed and sworn to before me, a Notary Public, this 16 day of March, 1981.

Notary Public

SHIRLEY MEIXNER
NOTARY PUBLIC-CALIFORNIA
SANTA CLARA COUNTY
My Commission Expires May 31, 1983

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6355

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,
Defendant,

DEBRA JEAN MORRIS,
Real Party in Interest
and Appellant.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT DIVISION FOUR

JURISDICTIONAL STATEMENT

STUART RICH
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,

Defendant,

DEBRA JEAN MORRIS,

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and Appellant.

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	3
Statement of the Case	4
A. How the Federal Question was Presented	4
B. Appeal from the Highest State Court	7
C. Finality of Judgment	11
The Federal Questions are Substantial	18
A. Conflict of Federal and State Law	18
B. Important Unsettled Questions of Law	21
C. Policy Considerations Relevant to Prima Facie Protection of Nude Entertainment	22
D. Vagueness of the County Ordinance's Theater Exemption Clause	26
Conclusion	28
Table of Constitutional Provisions, Cases and Statutes Cited	29
Appendix A - California Court of Appeal Opinion	
Appendix B - Santa Clara County Ordinance B 13-14	
Appendix C - California Penal Code §§ 318.5, 318.6	
Appendix D - California Supreme Court's Order of Denial of Appellant's Petition for Hearing	

JURISDICTIONAL STATEMENT

Debra Jean Morris, the real party in interest and appellant, appeals from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, dated October 2, 1980, upholding the facial constitutionality of Santa Clara County Ordinance B13-14, as not being violative of appellant's right of free speech guaranteed by the First and Fourteenth Amendment of the Constition of the United States.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is printed in Appendix A hereto, infra, and is an unofficial opinion numbered 1 Civil No. 48086. No other written opinions have been delivered.

JURISDICTION

(i) This is a pending criminal prosecution against the appellant, Debra Jean Morris. Appellant has been charged in the Municipal Court of California, San Jose-Milpitas Judicial District, with the violation of Santa Clara County Ordinance B13-14, Section (A)(3), proscribing exposure of buttocks "while participating in any live act, demonstration or exhibition in any public place." (Text of County Ordinance, Appendix B) Appellant contended that Santa Clara County Ordinance B13-14 is invalid because it is repugnant to the First and

Fourteenth Amendments to the Constitution of the United States. The decision of the California Court of Appeal, First Appellate District, Division Four, was in favor of the validity of Santa Clara County Ordinance B13-14.

(ii) The judgment sought to be reviewed is the ruling of the Court of Appeal of the State of California, First Appellate District, Division Four, dated October 2, 1980, and entered on November 3, 1980. A hearing in the California Supreme Court was denied by order dated January 28, 1981, with Justices Mosk, Tobriner, and Newman voting to grant the Petition for Hearing.

The notice of appeal to this Court was duly filed in the Court of Appeal of the State of California, First Appellate District, Division Four, on March 13, 1981.

This appeal is being docketed in this Court within 90 days from the denial of the Petition for Hearing to the Supreme Court of California. The jurisdiction of this Court is invoked under Section 1257(2) of Title 28 of the United States Code.

(iii) Cases sustaining the jurisdiction of this Court are:

(1) Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975)

(2) Chapman v. State of California, 405 U.S. 1020 (1972)

(3) Organization for a Better Austin v. Keefe, 91 S.Ct. 1575 (1971)

(4) Mills v. State of Alabama, 384 U.S. 237 (1966)

(5) North Dakota St. Bd. of Pharm. v. Snyders Drug Stores, Inc., 94 S.Ct. 407 (1973)

QUESTIONS PRESENTED

1. Whether the county ordinance's per se prohibition of nude dancing is constitutional based upon the California Supreme Court ruling in Crownover v. Musick, 9 Cal.3d 405 (1973) that nude dancing is mere conduct not entitled to prima facie First Amendment protection.
2. Whether the county ordinance's per se prohibition of live communicative entertainment is an apropriate subject matter for constitutional review by the symbolic speech standard of U.S. v. O'Brien, 391 U.S. 367 (1968) as argued affirmatively by the majority opinion in Crown over v. Musick, supra, 9 Cal.3d at 426-427.
3. Assuming the propriety of employing the O'Brien standard to review the per se prohibition of Santa Clara County Ordinance B13-14, does the county ordinance fail to meet the requirements of the symbolic speech standard due to the First Amendment constitutional infirmities of over-breadth and vagueness.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCE

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Ststes, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . .

California Penal Code Sections 318.5, 318.6

See Appendix C for full text.

Santa Clara County Ordinance B13-14

See Appendix B for full text.

STATEMENT OF THE CASE

A. HOW THE FEDERAL QUESTION WAS PRESENTED.

Appellant was employed by the Hiphugger, a San Jose establishment, to provide dance entertainment. On October 11, 1978, after performing a dance at the Hiphugger accompanied by contemporary music, Appellant was arrested by the Santa Clara County Sheriff's Department for violation of Santa Clara County Ordinance B13-14 (A)(3) which prohibits exposure of uncovered or less-than-opaquely-covered buttocks in a public place. Appendix B.

At the earliest stage of the trial court proceedings below, the Appellant raised the claim, in a demurrer to the criminal complaint, that Santa Clara County Ordinance B13-14 was unconstitutionally vague and overbroad and therefore a violation of her First Amendment rights to free speech (R. 6-20).[1.] The trial court issued an order sustaining the demurrer

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1. "R" references are to the record on appeal.

without leave to amend, on the basis of the county ordinance's unconstitutional overbreadth "in light of the First Amendment" (R. 16).

The People petitioned the Superior Court of Santa Clara County for an Alternative Writ of Mandate directing the trial court to vacate its order sustaining the demurrer, and order Appellant to enter her plea, or directing both the trial court and Appellant to show cause why a Peremptory Writ of Mandate should not issue.

The Superior Court of Santa Clara County issued the requested Alternative Writ of Mandate and, subsequent to a hearing on that writ, issued a Peremptory Writ of Mandate ordering the trial court to vacate its order sustaining the demurrer without leave to amend, to enter an order overruling the demurrer, and to set a time for entry of plea (R. 40-42, 78-80). The order issuing the Peremptory Writ of Mandate cited Crownover v. Musick, supra, as authority for the constitutional validity of Santa Clara County Ordinance B13-14 (R. 76).

Appellant noticed her appeal of the Superior Court order issuing the Peremptory Writ of Mandate to the California Court of Appeal, First Appellate District, on July 6, 1979 (R.86). The Superior Court order was affirmed in an unpublished opinion by the California Court of Appeal, First Appellate District, Division Four, on October 2, 1980.

The adverse decision by the Appellate Court was squarely decided on Appellant's federal claim and was based upon the

California Supreme Court ruling in Crownover v. Musick, supra, upholding the constitutional validity of similar ordinances. The California Court of Appeal's opinion stated:

> [The First Amendment overbreadth] ... argument cannot avail appellant in this court because we are bound by Crownover whether we deem it to have been correctly decided or not ... We again cite the reality that Crownover is biniding upon us, unless and until the Supreme Court holds otherwise in this or another case ...
> Appendix A at 5, 18)

On November 25, 1980, Appellant filed a Petition for Hearing with the Supreme Court of California appealing the intermediate appellate decision. The Supreme Court of California twice extended the time for granting or denying a hearing of the Petition. On January 28, 1981, the Supreme Court of California denied Appellant's Petition for Hearing by a four to three vote. Appendix D.

In all of the California appellate courts below, Appellant has raised her First Amendment claim that Santa Clara County Ordinance B13-14 was unconstitutionally overbroad based on this Court's decisions in California v. LaRue, 409 U.S. 109 (1972) and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). Furthermore, Appellant has also raised in the California appellate courts below, the federal issue of whether Santa Clara County Ordinance B13-14 was unconstitutionally vague in violation of her due process rights guaranteed by the Fourteenth Amendment of the United States Constitution (R. 48-72, Appendix A, Appellant's Petition for Hearing to the Supreme Court of California).

B. APPEAL FROM THE HIGHEST STATE COURT

The question of whether Appellant is appealing from the California Court of Appeal's decision or the California Supreme Court's denial order depends upon whether the higher court's order is interpreted as declining to exercise authority or an affirmance of the intermediate court's decision. Sullivan v. Texas, 207 U.S. 416; American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20-21; Norfolk & S. Turnpike Co. v. Virginia, 225 U.S. 264. The refusal of the highest state court to review a decision of a lower court may be considered an approval of the conclusion reached by the lower court, and therefore, an affirmance of the lower court's judgment. Minneapolis, St.P. & S. Ste. M.R. Co. v. Rock (1929), 279 U.S. 410; Cotthilf v. Sills (1963), 375 U.S. 79, 79-80. In Eisenberg v. Superior Court (1924), 193 Cal. 575, the California Supreme Court ruled that their denial of Appellant's petition to review the decision of the District Court of Appeal constituted an affirmance of the lower court's conclusion but not necessarily all of its reasoning.

In the present appeal, the constitutional validity of Santa Clara Ordinance B13-14 was directly drawn into question and squarely decided by the California Court of Appeal's opinion which was solely based on the precedent of Crownover v. Musick, supra. The California Supreme Court's denial of Appellant's Petition for Hearing was therefore, in effect, an affirmance of the intermediate Appellate Court's decision, and more importantly, a reaffirmance of their decision in Crown-

over v. Musick, supra, upholding the constitutional validity of similar ordinances.

Appellant's appeal to California's intermediate appellate court was premised on the First Amendment constitutionality of Santa Clara County Ordinance B13-14 in light of this Court's decisions in California v. LaRue, supra, Doran v. Salem Inn, Inc., supra. The county ordinance in question is authorized by a state enabling statute, California Penal Code §§ 318.5, 318.6, and is closely adapted from the statute's language. Similar ordinances enacted pursuant to Penal Code §§318.5, 318.6 were upheld in Crownover v. Musick, supra, at 425, on the basis that nude dancing is mere conduct not entitled to prima facie First Amendment protection.

This is directly contrary to this Court's decision in California v. LaRue, supra, at 397, that ordinances regulating nude dancing might address activity falling "within the limits of the constitutional protection of Freedom of Expression." The direct conflict between state and federal law as to whether nude dancing is entitled to prima facie First Amendment protection cannot be reconciled. The denial of Appellant's Petition for Hearing was implicitly grounded upon the absence of a debatable constitutional issue since the California Supreme Court had already decided Appellant's federal claims in Crownover v. Musick, supra.

In Tunney v. Ohio, 273 U.S. 510, 515 (1926), the Ohio Supreme Court denied the defendant's writ of error to review

the constitutionality of a statute providing for a trial by a village mayor, on the grounds that no debatable constitutional question was involved. This Court held, in Tunney v. Ohio, supra, that where a dismissal order from the highest state court is grounded upon the absence of a debatable constitutional issue, the order is an affirmance of the lower court's judgment and was therefore a final judgment reviewable by the Court.

Appellant's appeal is based solely on her federal claims regarding the constitutional validity of the county ordinance. These same federal claims were adversely decided upon by the decision in Crownover v. Musick, supra. Appellant would respectfully submit that the California Supreme Court's Denial of Appellant's Petition for Hearing was an affirmance of the lower court's decision and a reaffirmance of their seminal opinion in Crownover v. Musick, supra. Therefore, Appellant brings this appeal of right to the United States Supreme Court from the denial order of the California Supreme Court.

In the alternative, however, the denial of the Petition for Hearing by the California Supreme Court exhausts the California remedies for Appellant's federal claims, and this case may be properly reviewed by the Court as an appeal from the California Court of Appeal's decision. Sullivan v. Texas, 207 U.S. 416; American Ry. Exp. v. Levee, 263 U.S. 19, 20-21. If the California Supreme Court interlocutory order is viewed as the court declining to exercise its authority, then the

reviewable judgment under U.S.C. §1257(2) is that of the highest court possessing and exercising jurisdiction. Sullivan v. Texas, 207 U.S. 416.

C. FINALITY OF JUDGMENT

The appeal presently before this Court originated from a criminal pretrial proceeding where the Appellant demurred to the criminal complaint based upon the First Amendment unconstitutionality of Santa Clara County Ordinance B13-14. In criminal cases, the sentence is generally the final judgment conferring jurisdiction upon this court. Berman v. United States, 302 U.S. 211; Parr v. United States, 351 U.S. 513, 513. However, the recognized exception to the above general rule occurs in a case where an interlocutory order of the highest state court has finally determined the federal claim:

> [but] in which there are further proceedings -- even trials -- yet to occur in the state [court] but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained.
> Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 at 478.

In order for the California Supreme Court's denial order to be considered a final judgment, the interlocutory order:

> must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation ... It must be the final word of a final court.
> Market Street R.Co. v. Railroad Commission, 324 U.S. 548, 551.

The interlocutory order of the California Supreme Court affirming the intermediate appellate court's decision, which upheld the constitutionality of the county ordinance, is a determination from a court of last resort. There can be no further review or correction of the county ordinance's consti-

tutionality by the lower California courts. The most pertinent source of inquiry as to the finality of the California Supreme Court's interlocutory order is the applicable statutory and judicial case law of California. California Penal Code §§318.5, 318.6 are the enabling statutes which authorized the enactment of Santa Clara County Ordinance B13-14. Appendix B. The applicable judicial case law is embodied in the seminal California Supreme Court decision of Crownover v. Musick, supra, which upheld the First Amendment consitutionality of city and county ordinances enacted pursuant to Penal Code §§318.5, 318.6. Thus, the question of finality as to the county ordinance's constitutionality has been fully adjudicated by the California Supreme Court. Lastly, the record of appeal shows that the denial order of the California Supreme Court has in fact fully adjudicated the question of the county ordinance's constitutionality. See Appendix C. Department of Banking v. Pink, 317 U.S. 264, 268.

The issue of whether the interlocutory order of the California Supreme Court ruling on Appellant's criminal demurrer is a final appealable judgment depends upon the conclusive nature of Appellant's federal claims relative to the outcome of the pending trial court proceedings. Where non-federal issues or defenses may be raised on remand to the trial court, the federal claims decided by the highest state court may then become unnecessary to the disposition of the case. Interlocutory orders in such cases are nonfinal judgments for purposes

of §1257 appeals. McCombs v. Commissioners, 91 U.S. 1; Missouri & Kansas R. Co. v. Olathe, 222 U.S. 185. The exception to this general rule occurs where the defendant concedes that his/her case rests solely upon the federal claims as existed in the demurrer, and further concedes that no nonfederal issues or defenses exist in the case. Mills v. Alabama, 384 U.S. 214, 217-218; Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 382; Richfield Oil Co. v. State Board of Equalization, 329 U.S. 69, 72; and see Construction Laborers v. Curry, 371 U.S. 542, 551.

In the present appeal, Appellant concedes that her case rests solely upon her federal claims and that there are no nonfederal issues of fact or law nor defenses if she were to proceed to trial. Appellat at the time of arrest was dancing partially nude in an establishment that did not fall within the theater exemption clause of Santa Clara County Ordinance B13-14(b) (Appendix B). Appellant's sole defense is her federal claim that Santa Clara County Ordinance B13-14 is unconstitutionally overbroad and vague on its face in light of this Court's decisions in California v. LaRue, supra, and Doran v. Salem Inn, Inc., supra.

The effect of the California Supreme Court's denial of Appellant's Petition for Hearing has been to dispose of the case finally as a practical matter. Construction Laborers v. Curry, supra.

A case directly on point is Mills v. Alabama, supra, which involved a criminal state statute prohibiting the publi-

cation of partisan editorials on election day. The trial court sustained the defendant's demurrer to the complaint on the grounds that the statute violated the defendant's First Amendment rights. The Alabama Supreme Court reversed and remanded the case to the lower court for trial, whereupon the defendant appealed to this Court pursuant to U.S.C. §1257(2).

This Court in Mills v. Alabama, supra, at 216, recognized the Alabama Supreme Court's interlocutory order as a final judgment binding upon the trial court since the defendant had conceded the fact of his editorial on election day and therefore had no defense at the trial court level. The Mills v. Alabama opinion, supra, at 216, ruled that the defendant's pretrial appeal was appropriate under the circumstances, stating:

> Thus if the case goes back to the trial court, the trial so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court to repeat its rejection of Mills' constitutional contentions whereupon the case would then once more wend its weary way back to us as a judgment unquestionably final and appealable.
>
> Such a roundabout process would not only be an inexcusable delay ... [but] would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by congested dockets.

Appellant is currently pending trial in a California Municipal Court along with two companion cases arising from the same incident on October 11, 1978. As discussed, supra, Appellant's sole defense is her federal claim that the county ordinance violates her First Amendment right, which has now been conclusively determined against her by the California Supreme Court. A trial on the merits would be meaningless insofar as preserving the federal question or providing Appellant with an effective remedy. Appellant has no choice but to suffer a criminal conviction and the possible consequence of a sentence of six months maximum if the interlocutory order on the federal issue is not considered final for purposes of appeal to this Court.

The case before the Court presents a real danger of irreparable injury to the federal policies and constitutional concerns announced by this Court in California v. LaRue, supra, and Doran v. Salem Inn, supra, which an immediate appeal of the federal questions decided by the California Supreme Court would resolve. As indicated by this Court in Mathews v. Eldridge, 424 U.S. 319, 331, n. 11, the "core principle" in construing the "statutorily created finality requirements" should be the avoidance of "potentialy irreparable injuries to be suffered".

In LaRue v. California, supra, at 397, and Doran v. Salem Inn, Inc., supra, this Court addressed the questions of protecting communicative expression in nude dancing and the

government's interest in regulating the sale of liquor by the drink in licensed establishments where nude entertainment is presented. The resulting narrow liquor exception has been the national policy since the LaRue decision and has been followed in both federal and state jurisdictions as settled federal law. City of Kenosha v. Bruno, 412 U.S. 507, 515; Paladino v. City of Omaha, 471 F.2d 819 (8th Cir. 1972); Peto v. Cook, 364 F.Supp. (S.D. Ohio 1973), Aff'd, 415 U.S. 943, (1974); Clark v. City of Fremont, Nebraska, 377 F.Supp. 327 (1973); Escheat, Inc. v. Pierstorff, 354 F.Supp. 1120 (1973); Star Shock, Inc. v. Shusted, 493 F.2d 1401 (3d Cir.), ren'g 370 F.Supp. 506 (D.N.J. 1974); Salem Inn, Inc. v. Frank, 381 F.Supp. 859 (E.D.N.Y. 1974); Salem Inn v. Frank, 522 F.2d 1045, 1048-1050 (2d Cir. 1975); Attwood v. Purcell, 402 F.Supp. 231, 236 (D.Ariz. 1975); Sax v. Brennan, 416 F.Supp. 892, 894-895 (E.D.Wis.) Aff'd., 544 F.2d 521 (7th Cir. 1976); Richter v. Dept. of Alcoholic Beverage Control, 559 F.2d 1168 (9th Cir. 1977). See also state decisions. Salem v. Liquor Control Comm., 34 Ohio St. 2d 244, 298 N.E. 2d (1973); Com. v. Sees, Mass., 373 N.E.2d 1151; People v. Nixon, 88 Misc.2d 913, 390 N.Y.S.2d 518 (N.Y.App. Term 1976); Kippingen v. Fairmont, Minn. 248 N.W.2d 708, 715-716 (1976).

The ruling in Crownover v. Musick, supra, that nude dancing is mere conduct not entitled to prima facie First Amendment protection is directly in conflict with the settled federal law that nude dancing is entitled to First Amendment

review except in establishments serving liquor. This conflict between federal and state law violates the Supremacy Clause, Article 6, Clause 2, of the United States Constitution. Moreover, the Crownover decision frustrates uniformity of national policy regarding the protection of First Amendment rights as enunciated by this Court in LaRue v. California, supra.

The appeal before this Court also involves a controlling question of law as to which there is substantial ground for differences of opinion. An immediate appeal of this question of law would determine the case below.

In Crownover v. Musick, supra, at 425-428, the California Supreme Court held that similar ordinances were constitutional because they regulated mere "conduct" as distinguished from "speech". Pursuing a failsafe tactic, the highest state court further held that the similar ordinances were constitutional under the United States v. O'Brien (391 U.S. 367 [1968]) standard for symbolic speech assuming, arguendo, that the regulated conduct might include a "communicative element" entitled to First Amendment protection. Appellant would respectfully submit that the O'Brien standard is an inappropriate standard to apply to the county ordinance, but if applied, the county ordinance would fail to meet the O'Brien standard, as discussed infra. The question of what constitutional standard to apply to anti-nude dancing laws has not previously been decided by this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. CONFLICT OF FEDERAL AND STATE LAW

The California Supreme Court has determined that nude dancing is mere conduct not entitled to prima facie First Amendment protection:

> It is clear that these provisions of the ordinances are directed at conduct -- topless and bottomless exposure -- and not at speech or at conduct which is "in essence" speech or "closely akin to speech." Crownover v. Musick, 9 Cal. 3d 405, 425-426 (1973).

Decisions of this court have, however, recognized the prima facie First Amendment protection[2] to which nude entertainment is entitled.

> ...[W]e agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression. California v. LaRue, 409 U.S. 109, 119 (1972).
>
> Although the customary "barroom" type of nude dancing may involve only the bartest minimum of protected expression, we recognized in California v. LaRoe, 409 U.S. 109, 118, 93 S.Ct. 390, 379, 34 L.Ed.2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program. Doran v. Salem Inn, Inc., 422 U.S. 922, 933-934 (1973).

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2. The "cover" of prima facie protection can be removed, according to these decisions, by constitutionally permissible regulation pursuant to either the Twenty-First Amendment or a determination of obscenity.

Thus, there clearly exists a conflict of law between the Supreme Courts of California and the United States as to whether nude entertainment is unprotected conduct or is communicative expression entitled to prima facie First Amendment protection.

The majority opinion of the California Supreme Court in Crownover incorrectly distinguished LaRue as involving regulation of both film and live entertainment, whereas the Crownover ordinances regulated only live entertainment. Crownover v. Musick, supra, 9 Cal.3d at 696, fn. 15.[3]

This court's recognition that live "[nude] entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances"[4] clearly mandates prima facie First Amendment protection for all nude entertainment, i.e., protection in the absence of constitutionally permissible regulation.

The Crownover ruling that nude dancing is conduct and not protected expression is inconsistent with the LaRue and Doran decisions and, therefore, must be overruled in accordance with Article 6, clause two, the Supremacy Clause, of the United States Constitution. See State v. Fowler (1951), 83 A2d 67,

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3. The strained interpretation that LaRue did not provide constitutional protection to live entertainment was shown to be incorrect by the subsequent interpretation of Doran v. Salem Inn, Inn, supra, 422 U.S. at 933, quoted above.

4. Doran v. Salem Inn, Inc., supra, 422 U.S. at 933.

79 R.I. 16; City of Chicago v. Kimmel (1964), 201 N.E.2d 386; Trinkle v. Hand (1959), 337 P.2d 665, 184 Kan. 577, Certiorari denied 80 S.Ct. 101, 361 U.S. 846, 4 L.Ed.2d 85; Rachel v. State of Ga.(C.A. GA. 1965), 342 E.2d 336, rehearing denied 343 F.2d 909, affirmed 86 S.Ct. 1783, 384 U.S. 780, 16 L.Ed. 2d 925.

B. IMPORTANT UNSETTLED QUESTIONS OF LAW

As discussed briefly supra, Appellant's appeal raises an important question of first impression for the Court regarding what constitutional standard shall be employed in reviewing communicative nude entertainment outside the federal liquor exception (LaRue v. California, supra), and furthermore whether Santa Clara County Ordinance B 13-14 satisfies that constitutional standard.

The local ordinances reviewed in the Crownover decision are generally similar to the liquor regulations sustained in the LaRue decision with the important exception that ordinances enacted pursuant to PC §§ 318.5 and PC 318.6 are not limited to establishments serving liquor. This Court in LaRue v. California, supra, 409 U.S. at 116 found that the liquor regulations would proscribe some forms of visual presentation that would not be obscene under Roth but concluded that the regulations of liquor need not be confronted "within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in United States v. O'Brien, 391 U.S. 367 (1968)."

In contrast, the county ordinance in question must be confronted within either the limits of the obscenity standard or symbolic speech standard. The critical fact is that the county ordinance has banned nude entertainment across the board "in any public place" that does not qualify as a

"theater primarily devoted to theatrical performances." Appendix B. The theater exemption clause is patently vague on its face, as discussed infra, in Subsection D and consequently, does not shield the county ordinance from First Amendment overbreadth.

The California Supreme Court in Crownover v. Musick, supra has ruled that nude entertainment is mere conduct not entitled to constitutional review. The court, however, assumes arguendo that, if the nude entertainment has a communicative element, the ordinances still pass the constitutional muster of the O'Brien standard. If this court determines the O'Brien standard applicable to the county ordinance in question, Appellant would submit that the county ordinance fails to meet the requirements of the O'Brien standard.

The questions presented herein are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

C. POLICY CONSIDERATIONS RELEVANT TO PRIMA FACIE PROTECTION OF NUDE ENTERTAINMENT

This Court has consistently recognized the importance of affording prima facie First Amendment protection to nude entertainment and dance. California v. LaRue, supra, 409 U.S. at 119; Doran v. Salem Inn, Inc., supra; Schacht v. United States, 398 U.S. 58; P.B.I.C., Inc. v. Byrne, 313 F.Supp. 757 (Mass. 1970), vacated to consider mootness, 401 U.S. 987. Another decision illustrative of this Court's belief that

nude dance must be afforded prima facie First Amendment protection is In re Giannini, 69 Cal.2d 563 (1968), cert. denied sub nom. California v. Giannini, 395 U.S. 910 (1969), the decision overruled by the Crownover decision.

As discussed supra, the California Supreme Court has determined that nude entertainment is not entitled to such protection because it can be characterized as mere conduct "not akin to speech". Crownover v. Musick, supra, 9 Cal.3d at 425-426.

Utilization of the conduct-speech dichotomy articulated in Crownover, supra, would allow censorship of both performing and visual arts for political and moral purposes. The method of such censorship would be regulation of not only the dress of entertainers, but also regulation of the physical movements or stances of performers. Constitutional protection of free speech as painstakingly developed by decisions of this Court are meaningless if the conduct-speech dichotomy theory is condoned. As stated by this Court's Honorable Justice Marshall:

> It is senseless to say that a play is "speech" within the meaning of the First Amendment, but that the individual gestures of the actors are "conduct" which the State may prohibit. The State may no more allow movies while punishing the "acts" of which they are composed than it may allow newspapers while punishing the "conduct of setting type.
> California v. LaRue, supra, 409 U.S. at 403, Dissent of Marshall.

California Supreme Court Justice Tobriner also foresaw the great potential damage to freedom of speech embodied in the use of the conduct-speech theory of regulation.

> The adoption of this theory would let the censor loose without constitutional restriction to condemn at will any and all communicative entertainment. While avoiding reference to the actor's speech, the state could ban his gestures, his costuming (or amount of costuming), the positioning of the actors, the lighting of the stage, or whatever other "conduct" it chooses. Nor is the logic of the majority opinion confined to entertainment in bars or restaurants; it applies equally to the legitimate theater and to the motion picture. Neither is the logic of the opinion confined to the subject of nudity. If a county seeks to prohibit entertainers, or participants in a public demonstration, from wearing long hair, unfashionable dress, or uniforms (cf. Schacht v. United States [1970] supra, 398 U.S. 58), the majority opinion can be construed to uphold such legislation.
> Crownover v. Musick, supra, 9 Cal.3d at 436.

The fact that many of the performances prohibited by the ordinances enacted pursuant to California Penal Code §§318.5 and 318.6 may be tawdry and lacking in taste is of no significance to the protected status of such performances. Indeed, the potential chilling effect of such ordinances reaches to not only the tasteless communication, but to the tasteful work of art as well. Nudity in ethnic dances, bawdy Shakespeare, and ballet of unredoubtable quality may be presently banned under ordinances such as the one in question. Such a ban would inexorably interfere with both the performer's and the spectator's right to freedom of expression.

The emotive content of a work of art often communicates far more than the words of an entertainer. This court specifically recognized the importance of the emotional element when it declined to:

> ...sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.
> Cohen v. California, 403 U.S. 15, 26 (1971).

The costume, or lack thereof, is so intertwined with the aesthetic effect of dance as to be inseparable from the performance. In other words, the dance as a communication is significantly altered if costuming can be regulated by the state.

Entertainment does not lose its communicative aspect by virtue of the performer's state of dress or undress. Entertainment, as protected a form of expression as the discourse of ideas, must not be regulated and dictated by resort to a specious distinction between the entertainment's conduct and speech elements.

Freedom of expression necessarily involves the individual's right to choose the form and type of communication he wants to perceive or to present. Censorship based on the dichotomy of speech and conduct would destroy the individual's right to freely choose his favored artistic communications.

D. THE THEATER EXEMPTION CLAUSE OF SANTA CLARA COUNTY ORDINANCE B 13-14 IS UNCONSTITUTIONALLY VAGUE ON ITS FACE, AND THEREBY DOES NOT PRECLUDE THE ORDINANCE'S FIRST AMENDMENT OVERBREADTH

The California Court of Appeal's decision premises the validity of the county ordinance's ban of nude entertainment "in any public place" on the theater exemption provided in subdivision(b) of the ordinance which thereby "precludes any overbreadth in violation of the First and Fourteenth Amendments." Appendix B at p. 13. See also Crownover v. Musick, supra at 429-431.

Ordinances enacted pursuant to California Penal Code Sections 318.5, 318.6 must include provisions to exempt establishments which 1) qualify as a "theater, concert hall, or similar establishment" and 2) are primarily devoted to theatrical performances.

The county ordinance's theater exemption provisions are major restrictions on First Amendment freedoms. Employing the third requirement of the O'Brien standard, the County ordinance's theater exemption must be unrelated to the suppression of free expression. As a matter of due process, a law must provide "a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly!" Grayned v. City of Rockford 408 U.S. 104 at 109 (1972).

A police officer called upon to determine whether an establishment is exempt from the ordinance's proscription under the theater exemption clause must determine: 1) if the

establishment is a theater by objective physical characteristics; 2) if the nude entertainment constitutes a theatrical performance; and 3) whether the performances are the primary activity of the establishment.

An examination of California Appellate decisions following Crownover reveals the inherent confusion in trying to define the theater exemption clause. One court has rejected a rigid physical criteria definition of a theater as being too restrictive. Renba Lil v. Kortz 65 Cal App 3d 467, 472, (1976). Another court has employed an objective commercial test to determine the primary/secondary activity of the establishment. Theresa Enterprises v. Davis 81 Cal App 3d 940 (1978). While yet another appeallate court has construed the theater exemption to require a subjective interpretation of whether a performer's conduct is part of a theatrical performance on any given occasion Tauras Entertainment Ltd. v. Bates 107 Cal App 3d 14 (1980).

Both the objective and subjective interpretations of the theater exemption have a chilling effect on First Amendment freedoms. They are determining what communicative dance is to be allowed on the basis of subjective and objective criteria unrelated to the dance itself. Consequently, potential communicative expression outside of the objective criteria is being excluded from the protection of the theater exemption.

Contrary to the California appellate court's reasoning, the theater exemption clause does not preclude the county ordinance's First Amendment overbreadth as the theater exemption is hopelessly vague on its face.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiciton should be noted.

Dated 3-15-81

Lisa E. Wochos

Dated 3/15/81

Stuart C. Rich

Counsel for Appellant

TABLE OF CONSTITUTIONAL PROVISIONS, CASES

AND STATUTES CITED

Page

Constitutional Provisions:

First Amendment, United States Constitution 1, 3, 4, 5, 8, 11, 16, 17, 18 22, 23, 26

Fourteenth Amendment, United States Constitution 1, 4, 6

Supremacy Clause, Article 6, Clause 2, United States Constitution 17

Cases:

American Ry. Exp. Co. v. Levee 263 U.S. 19 ..... 7, 9

Attwood v. Purcell 402 F. Supp. 231 (b. Ariz. 1975) .. 16

Berman v. United States, 302 U.S. 211 11

California v. La Rue, 409 U.S. 109 (1972) 6, 8, 13, 15, 17, 18, 19, 21, 22, 23

Chapman v. State of California, 405 U.S. 1020 (1972) .. 2

City of Chigago v. Kimmel, 201 N.E. 2d 386 (Ill. 1964) 20

City of Kenosha v. Bruno, 412 U.S. 507 (1973) 16

Clark v. City of Fremont, Nebraska, 377 F. Supp. 327 (1973) 16

Construction Laborers v. Curry, 371 U.S. 542 13

Com v. Sees, Mass, 373 N.E. 2d 1151 16

Cotthiff v. Sills 375 U.S. 79 (1963) 7

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 2, 11

Crownover v. Musick, 9 Cal. 3d 405 (1973) 3, 5, 6, 7, 8, 9, 17, 18, 19, 21, 22, 23, 24, 26, 27

Department of Banking v. Pink, 317 U.S. 264 12

Doran v. Salem Inn, Inc. 422 U.S. 922 (1975)
..... 6, 13, 15, 18, 19, 22

Eisenberg v. Superior Court, 193 Cal. 575 (1924) 7

Escheat, Inc. v. Pierstorff, 354 F. Supp.
1120 (1973) 16

Grayned v. City of Rockford, 408 U.S. 104 (1972) 26

In re Giannini, 69 Cal 2d 563 (1968) Cert. den'd
Sub nom. California v. Giannini, 395 U.S.
91D (1969) 23

Koppingen v. Fairmont, Minn.,
248 N.W. 2d 708 (1976) 16

Market St. R. Co. v. Railroad Commission,
324, U.S. 548 11

Matthews v. Eldridge, 424 U.S. 319 15

McCombs v. Commissioners, 91 U.S. 1 13

Mills v. State of Alabama, 384 U.S. (1966) 2, 13, 14

Minneapolis, St. P. & S. Ste. M.R. Co. v. Roch
279 U.S. 410 (1929) 7

Missouri & Kansas R. Co. v. Olathe, 222 U.S. 185 13

Norfolk & S. Turnpike Co. v. Virginia, 255 U.S. 264 ... 7

North Dakota St. Bd. of Pharm. v. Snyders Drug
Stores, Inc., 94 S. Ct. 407 (1973) 2

Organization for a Better Austin V. Keefe,
91 S. C. 1575 (1971) 2

Paladino v. City of Omaha, 471
F. 2d 819 (8th Cir. 1972) 16

Parr v. United States, 351 U.S. 513 11

P.B.1C., Inc. v. Byrne, 313 F. Supp. 757
Mass. (1970) Vac'd to consider mootness,
401 U.S. 897 22

People v. Nixon, 390 N.YS. 2d 518 (1976) 16

Peto v. Cook, 364 F. Supp. (S.D. Ohio 1973), Aff'd 415 U.S. 943 (1974) 16

Pope v. Atlantic Coast Liner Co., 345 U.S. 214 13

Rachel v. State of Ga., 342 F.2d 336 (1965) Aff'd 384 U.S. 780 20

Renba Lil V. Kortz, 65 Cal. Akpp. 3d 467 (1976) 27

Richfield Oil Co. v. State Bd. of Equalization, 329 U.S. 64 13

Richter v. Dept. of Alcoholic Beverage Control, 599 F. 2d 1168 (9th Cir. 1977) 16

Salem Inn, Inc. v. Frank, 381 F. Supp 859 (E.D.N.Y. 1974) 16

Salem Inn, Inc. v. Frank, 522 F. 2d 1045 (2d Cir. 1975) 16

Salem v. Liquor Control Comm, 34 Ohio St. 2d 244 (1973) 16

Sax v. Brennan, 416 F. Supp. 892 (E.D. Wis. Aff'd 544 F. 2d 521 (7th Cir. 1976)) 16

Schact v. U.S., 398 U.S. 58 (1970) 22, 24

Star Shock, Inc. v. Shusted, 493 F. 2d 1401 (3d Cir.) rev'g 370 F. Supp 506 (D.N.J. 1974) 16

State v. Fowler, 83 A2d 67 (R.1. 1957) 19

Sullivan v. Texas, 207 U.S. 416 ..... 7, 9, 10

Tauras Entertainment Ltd. v. Bates, 107 Cal. App. 3d 14 (1980) 27

Theresa Enterprises v. Davis, 81 Cal. App. 3d 940 (1978) 27

Trinkle v. Hand, 337 P. 2d 665 (Kan. 1959) Cert. Den'd 361 U.S. 846 20

Tunney v. Ohio, 273 U.S. 510 (1926) 8, 9

U.S. v. O'Brien, 391 U.S. 367 (1968) .. 3, 17, 21, 22, 26

Statutes:

28 United States Code § 1257(2) 2

California Penal Code Section
318.5, 318.6 ..... 4, 12, 21, 24

Santa Clara County Ordinance B 13-14
.....1, 3, 4, 6, 7, 8, 21

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

APPENDIX "A"

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MUNICIPAL COURT OF CALIFORNIA, SAN JOSE-MILIPITAS JUDICIAL DISTRICT, Defendant, DEBRA JEAN MORRIS, Real Party in Interest and Appellant.	1 Civil 48086 (Super. Ct. No. 4249

FILED
OCT 2 1980
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk
By

This appeal challenges the constitutionality of Santa Clara County Ordinance B13-14, which prohibits so-called "topless" and "bottomless" dancing or displays in restaurants, bars, and other places.[1/]

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1. The enactment is apparently "section" B13-14 of an ordinance or code designated otherwise, but it has been identified since the inception of this proceeding as "Santa Clara County Ordinance B13-14." It provides in full--and verbatim--as follows:

"Sec. B13-14. Unlawful exposure of private parts.

"(a) Every person, with or without compensation, who acts as a waiter, waitress or entertainer in any establishment which serves food, beverages, or food and beverages, including, but not limited to alcoholic beverages, for

The facts are not disputed. Debra Jean Morris was arrested while she was dancing at a tavern where beer was served. She was charged with a violation of Ordinance B13-14 in a criminal complaint filed in the Municipal Court for the San Jose-Milpitas Judicial District. That court sustained her demurrer to the complaint, without leave to amend, on the ground that the ordinance was "unconstitutional in light of the First and Fourteenth Amendments."

(Fn. 1 continued)

consumption on the premises of such establishment; or while participating in any live act, demonstration or exhibition in any public place, place open to the public, or place open to public view, and who performs such activity in the nude, either actually or simulated, is guilty of a misdemeanor.

"'Nude' as used in this section means the simulated, the uncovered, or less than opaquely covered:

"(1) Male or female genitals

"(2) Pubic areas

"(3) Buttocks

"(4) Female breast below a point immediately above the top of the nipple, or

"(5) Female breast with only the nipple and areola covered.

"(b) The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. A theater, concert hall or other similar establishment means a building, playhouse, room, hall or other place having permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical, musical, dramatic, symphonic or other similar forms of artistic expression are presented."

The People thereupon petitioned the Santa Clara County Superior Court for a peremptory writ of mandate commanding the municipal court to vacate its order and to overrule the demurrer. The superior court ordered the issuance of an alternative writ, to which Morris appeared as real party in interest. After reviewing arguments, the superior court filed an order declaring that "Santa Clara County Ordinance B13-14 prohibiting certain topless-bottomless nude entertainment is valid" and citing Crownover v. Musick (1973) 9 Cal.3d 405. The court consequently entered a judgment directing the issuance of a peremptory writ of mandate as prayed by the People. Morris appeals from the judgment.

I

Appellant principally asserts the argument on which she prevailed in the municipal court, contending that Ordinance B13-14 is unconstitutionally overbroad because it purports to prohibit "communicative expression" which is protected by the First and Fourteenth Amendments of the United States Constitution.

The terms of the ordinance are closely adapted from the language of Penal Code sections 318.5 and 318.6, which

authorized its enactment in substance.[2/] (See Crownover v. Musick, supra, 9 Cal.3d 405 at p. 416.) It also resembles local ordinances which were sustained against

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2. As pertinent, these sections provide:

"318.5. Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks or of the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such person to perform such activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. . . .

"318.6. Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinace relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.

"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances."

a similar constitutional challenge in Crownover. (See id., at pp. 409-416, fns. 4, 6-7, 9; compare the text quoted in fn. 1, ante; see also 9 Cal.3d at pp. 418-428.) Appellant nevertheless contends in effect (1) that Crownover should not control here because it is inconsistent with the earlier decision of the United States Supreme Court in California v. LaRue (1972) 409 U.S. 109, and (2) that the asserted inconsistency has been made clear by that court's post-Crownover decision in Doran v. Salem Inn, Inc. (1975) 422 U.S. 922.

Standing alone, the first argument cannot avail appellant in this court because we are bound by Crownover whether we deem it to have been correctly decided or not. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455; Adams v. Southern Pac. Transportation Co. (1975) 50 Cal.App.3d 37, 40.) We may consider the second argument for the sole purpose of inquiring whether the subsequent decision of the United States Supreme Court in Doran has effectively diminished the authority of Crownover in an area controlled by that court. (See Adams v. Southern Pac. Transportation Co., supra, at p. 41; In re Harris (1971) 20 Cal.App.3d 632, 633-634; 6 Witkin, California Procedure (2d ed. 1971) Appeal, § 673, par. (1), pp. 4586-4587.)

For reasons which will appear, our examination of LaRue, Crownover, and Doran should commence with a reference to United States v. O'Brien (1968) 391 U.S. 367. The O'Brien court noted the distinction between "speech" and "nonspeech" for purposes of the First and Fourteenth Amendments, and established a four-part constitutional test to be applied to governmental regulation of "conduct" in which the two elements overlap, as follows:

"This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that

interest." (United States v. O'Brien, supra, 391 U.S. 367 at pp. 376-377 [footnotes omitted; bracketed numerals added].)

In LaRue, the United States Supreme Court rejected a First Amendment challenge of regulations of the California Department of Alcoholic Beverage Control which prohibited the live or filmed display of personal private parts, and of explicit sexual conduct, in establishments licensed by the Department to serve alcoholic beverages. (California v. LaRue, supra, 409 U.S. 109 at pp. 110-111.) The court acknowledged that the regulations proscribed some activities which might conceivably be protected by the First Amendment (id., at pp. 116, 118), but sustained them on the basis of the State's broad authority to regulate the sale of alcoholic beverages pursuant to the Twenty-first Amendment. (Id., at pp. 114-116, 118-119.)

The LaRue court suggested that material presented in a bona fide theatrical performance was to be equated with "speech" for purposes of First Amendment protection, but cited O'Brien for the view that whether mere "'concuct'" was entitled to protection depended on whether it included a "'communicative element.'" (409 U.S. at p. 117 [quoting United States v. O'Brien, supra, 391 U.S. 367 at p. 376].) As pertinent, the court concluded:

"The substance of the regulations . . . prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of a communication. . . . [¶] . . . [W]e would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre." (409 U.S. at p. 118.)

The local ordinances reviewed by the California Supreme Court in Crownover were generally similar to the liquor regulations sustained in LaRue (and closely similar to Santa Clara County Ordinance B13-14, as we have seen), but they were not exclusively supported by the broad enabling effect of the Twenty-first Amendment because their reach was not limited to places where alcoholic beverages were sold. (See Crownover v. Musick, supra, 9 Cal.3d 405 at pp. 409-416, fns. 4, 6-7, 9.) The Crownover court nevertheless concluded that they were constitutional because they were directed at mere "conduct," and not at "speech" or at conduct which could be equated with "speech." (Id.,

at pp. 425-426.) Proceeding to "assume for the purpose of argument" that they reached a "'communicative element'" which was constitutionally protected, the court applied the four-part O'Brien test and determined that they satisfied it in all respects. (Id., at pp. 426-427.) These conclusions were not grounded on LaRue, which the Crownover court deemed inapplicable on the basis that it was distinguishable. (Id., at p. 428, fn. 15.)[3/].

In Doran, the United States Supreme Court reviewed a preliminary injunction restraining the enforcement of "Local Law No. 1-1973," a similar ordinance enacted by the town of North Hempstead, New York. (Doran v. Salem Inn, Inc., supra, 422 U.S. 922 at p. 924.) The Doran court described Local Law No. 1-1973 as "an ordinance making it unlawful for bar owners and others to permit waitresses, barmaids and entertainers to appear in their establishments with breasts uncovered or so thinly draped as to appear uncovered." (Ibid.) As it had been interpreted by the United States District Court which preliminarily enjoined

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3. This distinction is actually a basis for appellant's underlying contention that Crownover was incorrectly decided. We need only note it, without examining it, because we are not at liberty to disagree with it. (Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450 at p. 455; Adams v. Southern Pac. Transportation Co., supra, 50 Cal.App.3d 37 at p. 40.)

its enforcement, the ordinance "'not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts.'" (Id., at p. 933 [quoting Salem Inn, Inc. v. Frank (E.D.N.Y. 1973) 364 F.Supp. 478, 483].)[4/]

Because of the procedural posture of the case, the Doran court restricted its "appellate inquiry" to a determination whether the District Court had "abused its discretion by granting preliminary injunctive relief." (422 U.S. at p. 934.) The court found no abuse of discretion, indicated that Local Law No. 1-1973 was valid on LaRue grounds as it applied to nude entertainment in bars, and definitively interpreted LaRue, stating:

"Although the customary 'bar room' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 US 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances. In LaRue, however, we concluded that the broad powers of the State to regulate the sale of liquor, conferred by the

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4. All or most of the text of the ordinance is reproduced in the opinion of the lower court. (Salem Inn, Inc. v. Frank, supra, 364 F.Supp. 478 at pp. 479-480, fn. 1.)

Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.

". . . Even if we may assume that the State of New York delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the ordinance would therefore be constitutionally valid under LaRue, supra, if limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited. Nor does petitioner raise any other legitimate state interest that would counterbalance the constitutional protection presumptively afforded to activities which are plainly within the reach of Local Law 1-1973. See United States v. O'Brien, 391 US 367, 377 (1968)." (Doran v. Salem Inn, Inc., supra, 422 U.S. 922 at pp. 932-934.)

A necessarily repetitive summary of these decisions again commences with O'Brien, which established that a local government may constitutionally regulate "conduct," even if it includes a "communicative element" otherwise protected by the First and Fourteenth Amendments, if the regulatory enactment satisfies the four-part O'Brien test which requires that a balance be struck between the protected interest and the governmental interest asserted in the enactment. (United States v. O'Brien, supra, 391 U.S. 367 at pp. 376-377.)

The LaRue court avoided the necessity of applying the O'Brien test to the California "liquor regulations" because it determined that they were constitutionally enabled and validated by the Twenty-first Amendment. (California v. LaRue, supra, 409 U.S. 109 at pp. 114-115, 118-119; Doran v. Salem Inn, Inc., supra, 422 U.S. 922 at pp. 932-933.) The court nevertheless preserved the viability of the test by citing O'Brien in contexts which effectively approved its application in a proper case. (See California v. LaRue, supra, at pp. 113-114, 116-118.)

In Crownover, the California Supreme Court held that ordinances of the type before us are constitutional because they regulate mere "conduct," as distinguished from protected "speech." (Crownover v. Musick, supra, 9 Cal.3d 405 at pp. 425-426.) Essentially pursuing a fail-safe tactic, the court then held that the ordinances were constitutional under the O'Brien test if the conduct they regulated included a "communicative element" which might in itself be entitled to the protection of the First and Fourteenth Amendments. (Id., at pp. 426-428.)

The first Crownover holding controls this case in any event. The fail-safe holding controls it if the O'Brien test remains viable. Its continuing viability was manifested by the Doran court, which expressly acknowleged its

existence but had no basis for applying it because the party entitled to claim its benefit had not done so. (Doran v. Salem Inn, Inc., supra, 422 U.S. 922 at p. 934.) Crownover thus survives Doran because O'Brien does; it stands undiminished as authority in any respect; and it controls here in all events. The trial court properly followed in it holding that Santa Clara County Ordinance B13-14 is constitutional.

II

Appellant also contends that Ordinance B13-14 is unconstitutionally overbroad because its reach is not limited to places where alcoholic beverages are sold. This contention rests on the premise that the authority of government to regulate nude activity in public places extends as far as the Twenty-first Amendment permits but no further. The contention fails because the premise is invalid. (See Doran v. Salem Inn, Inc., supra, 422 U.S. 922 at pp. 932-934; California v. LaRue, supra, 409 U.S. 109 at p. 117.) The "theater" exemption provided in subdivision (b) of the ordinance (see fn. 1, ante) precludes any overbreadth in violation of the First and Fourteenth Amendments. (See United States v. O'Brien, supra, 391 U.S. 367 at pp. 376-377; California v. LaRue, supra; Crownover v. Musick, supra,

9 Cal.3d 405 at pp. 429-431.) Contrary to a collateral assertion by appellant, the "theater" exemption does not operate to deny equal protection of the laws by discriminating "between theater-type establishments and other public places." (Crownover v. Musick, supra.)

III

She further argues that the language of the exemption defining a "theater" violates the "preemption doctrine" because its terms are more specific than those of the "theater" exemption established by the Legislature in Penal Code sections 318.5 and 318.6. (See fn. 2, ante.) She contends from this premise that the trial court erred in failing to "condition its writ of mandate . . . upon severance of the preempted theatre definition . . . ."

The authority cited for these points is Renba Lil v. Kortz (1976) 65 Cal.App.3d 467, in which the Court of Appeal examined virtually identical language in an ordinance of the City of Long Beach. (See id., at p. 471, fn. 3.) The court held that the language "invades the area expressly excepted in Penal Code sections 318.5 and 318.6 and is therefore invalid" (p. 472) in light of the preemption doctrine. (P. 473 [citing Cal. Const., art. XI, § 7;

In re Lane (1962) 58 Cal.2d 99, 102].) The court also held, however, that the invalid language was "easily severable from the rest of the ordinance in question" and that the remainder was valid and enforceable because it comported with Crownover. (Renba Lil v. Kortz, supra, at p. 474.)

We have seen that subdivision (a) of Santa Clara County Ordinance B13-14 is similarly valid and enforceable in light of Crownover. Its enforcement is subject to the "theater exemption" provided in subdivision (b), but it is also "easily severable" from any language in that subdivision which purports to define the preempted term "theater" with invalid particularity. The severability appears on the face of the ordinance as a matter of law, and it is essentially self-executing. (Cf. Renba Lil v. Kortz, supra, 65 Cal.App.3d 467 at pp. 472, 474; see City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 931-932.) The trial court did not err in failing to "condition its writ of mandate" upon a severance which operates as a matter of law.

IV

Apart from the severable provisions purporting to define the term "theater" alone, appellant contends that

the language incorporated into the "theater exemption" from Penal Code sections 318.5 and 318.6 is unconstitutionally vague. (See fns. 1 and 2, ante.) She is entitled to challenge the "theater exemption" on this ground despite the fact that she was arrested for violating Ordinance B13-14 in a tavern (Doran v. Salem Inn, Inc., supra, 422 U.S. 922 at p. 933), but her contention is also to be rejected on the authority of the Crownover decision. (Crownover v. Musick, supra, 9 Cal.3d 405 at p. 429, fn. 18; Renba Lil v. Kortz, supra, 65 Cal.App.3d 467 at p. 473.) "In excepting theaters from the operation of Penal Code sections 318.5 and 318.6, the Legislature must be held to have intended the word to be given its ordinary meaning. . . . This must be done on a case-by-case basis." (Renba Lil v. Kortz, supra, at p. 472.)

V

Appellant also argues in effect that Ordinance B13-14 operates as an impermissible "prior restraint" on constitutionally protected activity because it "requires that the police independently determine whether a given location is a theatre, concert hall or similar establishment primarily devoted to theatrical performances." The "prior restraint"

doctrine invoked by this argument prevents nonjudicial officers from exercising unbridled discretion in censoring expressive activity before a court has determined whether or not the activity is protected by the First Amendment. (Freedman v. Maryland (1965) 380 U.S. 51, 57-60; Near v. Minnesota (1931) 283 U.S. 697, 713-721; see Wilson v. Superior Court (1975) 13 Cal.3d 652, 656-659.)

Ordinance B13-14 does not permit this because it does not require or allow police officers to exercise any discretion in identifying the activity it prohibits, which it describes in precise detail. (See fn. 1, ante.) It is accordingly not vulnerable to challenge on the basis of the "prior restraint" doctrine. Its enforcement requires police officers to determine whether the prohibited activity has occurred in a "theater, concert hall, or similar establishment which is primarily devoted to theatrical performances," but this language is not unconstitutionally vague. (Crownover v. Musick, supra, 9 Cal.3d 405 at p. 429, fn. 18; Renba Lil v. Kortz, supra, 65 Cal.App.3d 467 at p. 473.) It therefore poses no danger of "arbitrary and discriminatory enforcement." (See Grayned v. City of Rockford (1972) 408 U.S. 104, 108-110.

VI

Miscellaneous points raised or suggested by appe need not be discussed because they are variations of essential contentions that Crownover was incorrectly or is no longer valid as authority. We again cite th reality that Crownover is binding upon us unless and the Supreme Court holds otherwise in this or another (Auto Equity Sales, Inc. v. Superior Court, supra, 57 450 at p. 455; Adams v. Southern Pac. Transportation supra, 50 Cal.App.3d 37 at p. 40.)

The judgment is affirmed.

Rattigan, Acting P. J.

We concur:

Christian, J.

Kroninger, J.*

*Assigned by the Chairperson of the Judicial Council.

1 Civil 48086

Sec. B13-13. Misleading, false, unfounded reports to sheriff.

No person shall knowingly and wilfully furnish, give or make a false, misleading or unfounded report to the sheriff's office for the purpose of interfering with the proper operation of the sheriff's office or any of its deputies, or both. (Code 1954, § 6.2.1-11; Ord. No. NS-612, § 1, 8-15-55; Ord. No. NS-616, § 1, 3-25-57)

Sec. B13-14. Unlawful exposure of private parts.

(a) Every person, with or without compensation, who acts as a waiter, waitress or entertainer in any establishment which serves food, beverages, or food and beverages, including, but not limited to alcoholic beverages, for consumption on the premises of such establishment; or while participating in any live act, demonstration or exhibition in any public place, place open to the public, or place open to public view, and who performs such activity in the nude, either actually or simulated, is guilty of a misdemeanor.

"Nude" as used in this section means the simulated, the uncovered, or less than opaquely covered:

(1) Male or female genitals

(2) Pubic areas

(3) Buttocks

(4) Female breast below a point immediately above the top of the nipple, or

(5) Female breast with only the nipple and areola covered.

(b) The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. A theater, concert hall or other similar establishment means a building, playhouse, room, hall or other place having permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical, musical, dramatic, symphonic or other similar forms of artistic expression are presented.

(c) Every person is guilty of a misdemeanor who permits, procures, counsels, or assists any person to violate any provision of this section. (Code 1954, § 6.2.1-14; Ord. No. NS-623, § 1, 10-28-69; Ord. No. NS-623.1, § 1, 6-19-73)

State law reference—Ordinances of this nature not invalidated by Penal Code, §§ 318.5, 318.6.

Sec. B13-15. Obstructing entrances.

No person shall loiter, stand or sit in or at the entrance to any church, hall, theater or other place of public assemblage in the county so as to in any manner obstruct such entrance. (Code 1954, § 6.2.1-5)

Sec. B13-16. Possession of firearms on county flood control and water district—Prohibited.

No person shall, while on or upon any lands, reservoirs or structures owned or operated by the Santa Clara County Flood Control and Water District, have in his possession or under his custody or control firearms of any kind. (Code 1954, § 6.2.1-4)

Cross reference—Possessing weapons in parks, § B14-15.

Sec. B13-17. Same—Exceptions.

The provisions of section B13-16 shall not apply to any peace officer, or any person employed by the county, the state, or by the United States to destroy predatory animals, birds or pests as defined in Section 5006 of the Agricultural Code, when acting in the course of his employment. (Code 1954, § 6.2.1-4.1)

Sec. B13-18. Same—Signs.

Appropriate signs prohibiting the possession of firearms shall be erected and displayed, not less than three (3) to a mile, along all exterior boundaries and at all roads and trails entering the lands of the Santa Clara County Flood Control and Water District. (Code 1954, § 6.2.1-4.2)

Note 12

12. Questions of fact

Whether invitation and device of defendant were in whole or in part causes moving any of persons visiting ship for purpose of gambling to do so was for jury. People v. Chase (1931) 1 P.2d 60, 117 C.A.Supp. 775.

§ 318.5 Public exposure by employees or entertainers in food or beverage establishment; local regulations; exemptions

Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks of or the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such person to perform such activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.

This section shall be known and may be cited as the "Quimby-Walsh Act."

(Added by Stats.1969, c. 1534, p. 3128, § 1.)

Library References

Municipal Corporations ⇐592 et seq. C.J.S. Municipal Corporations § 143.

§ 318.6 Public exposure by participants in live acts, demonstrations or exhibitions; local regulations; exemptions

Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinance relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.

The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.

(Added by Stats.1969, c. 1535, p. 3129, § 1.)

APPENDIX D

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, Civil No. 48086

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Plaintiff and Respondent,

v.

THE MUNICIPAL COURT OF THE SAN JOSE-MILPITAS JUDICIAL DISTRICT, Defendant;
MORRIS, Real Party in Interest and Appellant.

Taylor, J., sitting under assignment by the Chairperson of the Chairperson of the Judicial Council.

Appellant's petition for hearing DENIED.

Tobriner, J., Mosk, J., and Newman, J., are of the opinion that the petition should be granted.

SUPREME COURT
FILED
JAN 28 1981
LAURENCE P. GILL, Clerk
Deputy

Bird
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

FILED
MAR 13 1981
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk
BY _____ DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. MUNICIPAL COURT OF CALIFORNIA, SAN JOSE-MILPITAS JUDICIAL DISTRICT, Defendant, DEBRA JEAN MORRIS, Real Party in Interest and Appellant.	1 Civil No. 48086 Municipal Court No. C156590

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Debra Jean Morris, the appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal, First Appellate District, Division Four, entered on October 2, 1980, a hearing on which was denied by the California Supreme Court on January 29, 1981.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Dated: March 11, 1981.

Stuart Rich

STUART RICH
LISA E. WOCHOS
Counsel for Appellant
12346 Indian Trail Road
Los Gatos, CA 95030

NO. 1 Civil #48086

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, a resident of Santa Clara County, over the age of eighteen years and not a party to the above entitled action. My business address is Suite 300, 95 South Market Street, San Jose, California 95113.

On March 11, 1981 I served copies of the Notice of Appeal to the Supreme Court of the United States

on the parties interested in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office at San Jose, California, addressed as follows:

Clerk of Court
Supreme Court of the
State of California
Room 4050 State Building
San Francisco, CA 94102

Clerk of Court
Municipal Court, Santa Clara County
San Jose-Milpitas Judicial District
200 West Hedding Street
San Jose, CA 95110

Clerk of Court
California Court of Appeal
First Appellate District
Division Four
State Building, Room 4154
455 Golden Gate Avenue
San Francisco, CA 94102

Attorney General of the
State of California
6000 State Building
Sar Francisco, CA 94102

Office of the District Attorney
Santa Clara County
70 West Hedding Street
San Jose, CA 95110

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Jose, California, on March 11, 1981.

Shirley Meixner

Shirley Meixner

Office-Supreme Court, U.S.
FILED
JUN 3 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

No. 80-6355

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,
Defendant,

DEBRA JEAN MORRIS,
Real Party in Interest
and Appellant.

ORIGINAL COPY

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT DIVISION FOUR

MOTION TO DISMISS OR AFFIRM

ROBERT L. WEBB
Assistant District Attorney
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70 West Hedding Street, 6th Floor
San Jose, California 95110
Telephone: (408) 275-9651

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,

Defendant,

DEBRA JEAN MORRIS,

Real Party in Interest
and Appellant.

MOTION TO DISMISS OR AFFIRM

The appellee moves the court to dismiss the appeal herein, or, in the alternative, to affirm the judgement of the Court of Appeals of the State of California, First Appellate District, Division Four, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.

I.

THE COUNTY ORDINANCE INVOLVED AND THE NATURE OF THE CASE.

A. THE ORDINANCE

This appeal raises the question of the constitutional validity of Santa Clara County Ordinance B13-14 which prohibits so-called "topless" and "bottomless" dancing or displays in restaurants, bars, and other places. The ordinance reads as follows:

"Sec. B13-14. Unlawful exposure of Private Parts.

"(a) Every person, with or without compensation, who acts as a waiter, waitress or entertainer in any establishment which serves food, beverages, or food and beverages, including, but not limited to alcoholic beverages, for consumption on the premises of such establishment; or while participating in any live act, demonstration or exhibition in any public place, place open to the public, or place open to public view, and who performs such activity in the nude, either actually or simulated, is guilty of a misdemeanor.

"'Nude' as used in this section means the simulated, the uncovered, or less than opaquely covered:

"(1) Male or female genitals

"(2) Pubic areas

"(3) Buttocks

"(4) Female breast below a point immediately above the top of the nipple, or

"(5) Female breast with only the nipple and areola covered.

"(b) The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. A theater, concert hall or other similar establishment means a building, playhouse, room, hall or other place having permanently affixed so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical, musical, dramatic, symphonic or other similar forms of artistic expression are presented."

B. THE PROCEEDINGS BELOW

The Appellant, after the effective date of the Santa Clara County Ordinance, was employed by The Hiphugger Bar as a dancer. She was arrested by local county Sheriff deputies for dancing in violation of the standards of County Ordinance B13-14.

Contending that the County Ordinance was constitutionally invalid under both state and Federal standards, the Appellant instituted this action. Appellant began by filing a demurrer to the complaint in the trial court, which was sustained, without leave to amend. The People petitioned the Superior Court of Santa Clara County for a writ of mandate, asking the Superior Court to order the trial court to vacate its order sustaining the demurrer. After a full hearing in Superior Court, that court issued a peremptory Writ of Mandate, ordering the trial court to vacate its order sustaining the demurrer without leave to amend, and to enter an order overruling the demurrer.

Appellant then filed an appeal in the California Court of Appeals, First Appellate District. The Appellate Court affirmed the order of the California Superior Court in an unpublished opinion. Appellant then filed a petition for hearing in the

California Supreme Court, which was denied.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

Appellant's basic contention is that the current published opinion of the California Supreme Court, Crownover v. Musick, 9 C3d 405 (1973), which was the basis for both the California Superior Court and California State District Court of Appeals decision in favor of appellee, is in conflict with decisions of this court, namely, California v. LaRue, 409 US 109(1972) and Doran v. Salem Inn, Inc., 422 US 922(1975). The California Supreme Court apparently did not agree with Appellant's contention as that court refused to grant her request for a hearing.

Appellant would have this court believe that the ordinance in question is overbroad because it purports to regulate "conduct" which is a "communicative expression" protected by the First and Fourteenth Amendments of the United States Constitution. This court has already made clear the standards to apply when such "speech" and "nonspeech" rights overlap. This was done in United States v. O'Brien (1968), 391 US 367. The O'Brien court held that a government regulation is sufficiently justified:

(1) if it is within the constitutional power of the government.

(2) if the government interest is unrelated to the suppression of free expression.

(3) if it furthers an important or substantial government interest.

(4) if the incidental restriction on alleged First Amendment freedoms is no gr ater than is essential to the furtherance of that interest.

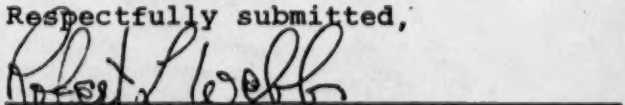
In Crownover, supra, the California Supreme Court held that ordinance of the type involved in these proceedings are constitutional because they regulate mere "conduct", as distinguished from protected speech, and also that such ordinances are constitutional under the O'Brien test even if the conduct they regulate includes a "communicative element" which might in itself be entitled to the protection of the First and Fourteenth Amendments (Id., at pages 426-428).

The Doran court, supra, held that the O'Brien test still remains viable, even though the party entitled to claim its benefit had not done so. Therefore, contrary to Appellant's argument that Crownover is in conflict with opinions of this court, it is obvious that Crownover parallels and is consistent with the reasoning and rationale of both LaRue and Doran.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgement entered in the cause by the California Court of Appeals, First District, Division Four.

Respectfully submitted,



ROBERT L. WEBB
Counsel for Appellee

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6355

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PEOPLE OF THE STATE OF CALIFORNIA,
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vs.
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Defendant,
DEBRA JEAN MORRIS
Real Party in Interest
and Appellant

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT DIVISION FOUR

APPELLANT'S REPLY BRIEF

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10

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MUNICIPAL COURT OF CALIFORNIA,
SAN JOSE-MILPITAS JUDICIAL DISTRICT,

Defendant,

DEBRA JEAN MORRIS,

Real Party in Interest
and Appellant.

APPELLANT'S REPLY BRIEF

In light of the Court's recent decision in Schad v. Borough of Mount Ephraim 41 CCH S. Ct. Bull p B2916 and the decision of the United States Court of Appeals Ninth Circuit in Chase v. Davlaar (USCA, 9th, May 18, 1981) Appellant would offer additional arguments to the central issue before the Court in the above entitled appeal.

THE STANDARD OF REVIEW FOR THE FIRST AMENDMENT PROTECTION OF NUDE ENTERTAINMENT IS UNSETTLED, HOWEVER THE NATURE OF COMMUNICATIVE NUDE ENTERTAINMENT SHOULD PRECLUDE THE EMPLOYMENT OF THE SYMBOLIC SPEECH STANDARD

The decision in Schad v. Borough of Mount Ephraim, supra, has conclusively established that live nude entertainment is entitled to First Amendment protection. The ruling of the California Supreme Court in Crownover v. Musick 9 Cal 3d 405 (1973) that live nude entertainment is "mere conduct" not entered to First Amendment protection is directly in conflict with this Court's decisions and therefore must fall. California v. LaRue 409 US 109 (1972); Doran v. Salem Inn, Inc. 422 U.S. 922 (1975); Schad v. Borough of Mount Ephraim, supra.

The Crownover opinion also concluded that if, however, live nude entertainment contained a protective element; the ordinances were still constitutional under the O'Brien

standard. United States v. O'Brien 391 U.S. 367 (1968). This fail-safe holding in Crownover raises the undecided threshhold issue of whether O'Brien is the proper constitutional standard of review for live nude entertainment. The California Court of Appeal decision, herein, has interpreted the decisions in LaRue and Doran as preserving the viability of the O'Brien standard with regard to the present appeal.

Appellant would respectfully submit that the Court's rulings in LaRue and Doran were based solely upon the power of the states to regulate liquor under the Twenty-First Amendment. The Court has recognized that the regulation of liquor is an objective classification so unrelated to communicative nude entertainment as to preclude the need for constitutional review by either obscenity or symbolic speech standards. California v. LaRue, supra, at 116. Indeed the Schad opinion has reconfirmed the fact that the issue of what constitutinal standard of review "shall be extended to nude dancing" has not been previously determined by the Court. 41 C.C. S. Ct. Bull p B2922.

In a case directly on point, Chase v. Davlaar, supra, the United States Court of Apeals (Ninth Circuit) found a county resolution which prohibited topless entertainment in all non-theatrical establishments selling food or beverages ("including but not limited to alcoholic beverages") unconstitutionally overbroad on its face. The federal appellate

court held that the valid governmental interests to be promoted by the resolution "could have been served just as well by a more narrowly drawn statute applicable only to liquor selling establishments." Chase v. Davlaar, supra at ___.

The Court in Chase v. Davlaar, supra, at footnote 13 and 14 dismissed the relevancy of the O'Brien standard to live nude entertainment and thereby placed the federal opinion in direct conflict with the contrary holding in Crownover v. Musick, supra, at 427. The Ninth Circuit Court characterized the symbolic speech issue presented in O'Brien as "conduct generally considered non-expressive, which the actor asserts to be communicative." Chase v. Davlaar, supra, at ___. In contrast, the county resolution in the Chase opinion was overbroad because the resolution protected establishments from presenting entertainment "ordinarily regarded as expressive." Chase v. Davlaar, supra, at ___. The appliability of the O'Brien standard is limited to an act of symbolic speech which is not essentially related to protected communication, and can be clearly differentiated from the expression of dance which is performed on a stage as entertainment for an audience.

The Court in O'Brien, supra, at 382, insured the narrow scope of the symbolic speech standard by limiting the govern-

mental interests in regulating conduct to the "noncommunicative impact" of conduct. The O'Brien opinion distinguished a noncommunicative governmental interest, such as the availability of issued selective service certifications, from the case "where the alleged conduct arises in some measure because the communication allegedly integral to the conduct itself is thought to be harmful." United States v. O'Brien supra at 382. In the present appeal the purpose of the county ordinance is to prohibit nudity in live entertainment because the effect of nude entertainment on audiences is considered harmful.

Assuming, arguendo, the applicability of the O'Brien standard, the county ordinance can be sustained as a regulation of noncommunicative conduct only if the governmental interests are unrelated to the suppression of free expression. United States v. O'Brien, supra. Based upon the rationale of only regulating "the form or manner" of the communication the Crownover court concluded that the regulation of conduct (costuming) did not affect the speech (dance) Crownover v. Musick, supra, at 68.

Yet by changing the form or manner of entertainment, through the regulation of costuming, the requisite relationship between nudity and the expression of dance is significantly altered. In comparison to the state's valid interest in regulating liquor, the regulation of a performer's cos-

tume in a non-alcoholic location clearly establishes the government's aim as "prohibiting a type of entertainment" Crownover v. Musick, supra, Justice Tobriner's dissent at 707.

The court in Chase v. Davlaar, supra, footnotes 4 and 12, termed the speech/conduct dichotomy as conceptually weak and found the distinction unable to resolve the overbreadth problem as insubstantial in view of this Court's decision in California v. LaRue, supra. The same overbreadth problem arises in the county ordinance involved herein, where nude entertainment in non-alcoholic establishments is banned. The Crownover opinion gave no significant justification for the exclusion of protected nude entertainment in establishments not serving liquor. Nor was any evidence presented in the Crownover decision showing a nexus between live nude entertainment in non-alcoholic establishments and the occurrence of unusual problems for the community, Schad v. Borough of Mount Ephraim 41 C.C.H. S. Ct. Bull p. B2929.

Appellant would respectfully submit that such a nexus between nude entertainment and related objectionable conduct has only been demonstratd in liquor licensed bars and nightclubs where nude entertainment has been featured, California v. LaRue, supra.

CONCLUSION

Appellant's appeal raises an important question of first impression for the Court regarding what constitutional standard shall be employed in reviewing communicative nude entertainment presented in non-alcoholic establishments. The constitutional validity of the California Supreme Court's decision in Crownover v. Musick, supra, rests upon whether the O'Brien standard is applicable, and if so, whether the county ordinance satisfies the O'Brien's standard. The decision in Chase v. Davlaar, supra, dismissed the applicability of the O'Brien standard and thereby created an irrevocable conflict betwen state and federal case law, Crownover v. Musick, supra.

Appellant would respectfully submit that the intervention of this Court is needed in order to resolve the conflict of constitutional law and preserve Appellant's First Amendment rights.